IN THE

Supreme Court of the United States

No. 215

UNITED SERVICES LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

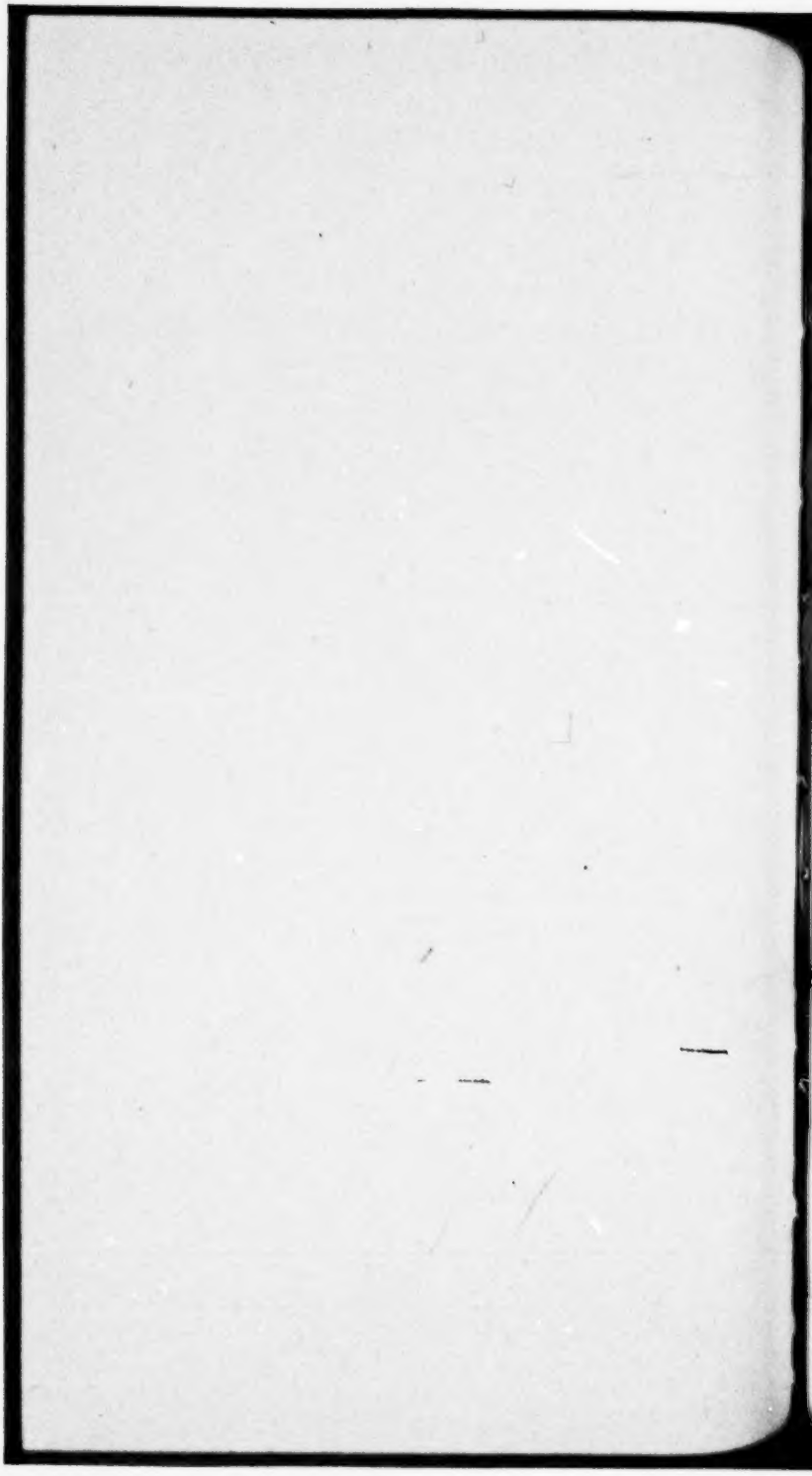
v.

RICHARD H. BOYE AND LUCY BAUTZ BOYE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

NEIL BURKINSHAW,
930 Shoreham Building,
Washington 5, D. C.
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

Subject Matter.

Table of Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

No. .....

UNITED SERVICES LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

v.

RICHARD H. BOYE AND LUCY BAUTZ BOYE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

United Services Life Insurance Company of Washington, D. C., petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia, decided June 14, 1948. The United States Circuit Court reversed the judgment of the United States District Court for the District of Columbia entered on July 10, 1947, finding for this petitioner in an action wherein the respondents sued petitioner on a policy of life insurance.

The instant cause of action involved the question of whether an aviation exclusion clause should be applied in a

case of a pilot of a Flying Fortress which took off during the war from England on a bombing mission over Peenemunde, Germany, and thereafter failed to return. The insurance company resisted the claim on the ground that on the known facts, as well as the official records of the Casualty Section of the Office of the Adjutant General of the Army, the insured came to his death within the terms of the aviation exclusion clause contained in the policy.

Opinions Below.

There is no reported opinion of the trial court. However, it appears in the record on pages 14 and 15. The opinion of the United States Circuit Court of Appeals for the District of Columbia has not as yet appeared in the advance sheets of the Federal, but is contained in 13 Commerce Clearing House, Life cases, page 231.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA 347).

Question Presented.

Whether the pilot of an American military plane on a bombing mission over Germany, involving a flight over the North Sea, was presumed to have lost his life simply on the basis of the failure of either himself or his plane to return with other units of the mission; particularly when the records of the Casualty Section of the Office of the Adjutant General of the Army point to the fact that two planes failed to return and one was seen going down in flames over the target.

Statement of Facts.

Judgment was entered for petitioner in the trial court on counter motions for summary judgment. There is no issue of fact, all of the known facts being of record in the pleadings.

The complaint of the plaintiffs (respondents) (R. 1) alleges that defendant (petitioner) executed and delivered to Richard E. Boye its policy of life insurance in the sum of $5,000.00, providing that the defendant agreed to pay to the plaintiffs, as the named beneficiaries, the said sum of $5,000 immediately upon proof of the death of said Richard E. Boye; that said Richard E. Boye died on, to wit, August 25, 1944; that all premiums on said policy had been paid and it was in full force and effect at the time of the death of the insured; that due and proper proof of death was delivered to defendant at its home office; and that plaintiffs have demanded payment of the said sum of $5,000 pursuant to the policy, but defendant has failed and refused to pay the same. A photostatic copy of the said policy was attached as an Exhibit and the pertinent portions thereof appear in the Record (R. 3-7).

By its answer (R. 8), defendant admitted all of the allegations of the complaint. By way of further answer and as an affirmative defense, defendant avers that said policy contained an aviation exclusion clause (appearing in the policy at R. 7, but incorrectly quoted in the answer at R. 8), the material provisions of which are:

> "AVIATION EXCLUSION. It is hereby understood and agreed that if this Policy shall, at any time prior to the policy anniversary nearest the Insured's age thirty years, become a claim by death of the Insured due to operating or riding in any kind of aircraft * * * the liability of the Company under this Policy shall be limited to the premiums paid hereunder, or to the then net reserve at the time of death, if greater; any provision in this Policy to the contrary notwithstanding."

The answer further alleges that said aviation exclusion clause precludes recovery by plaintiffs of the face amount of the policy, and that plaintiffs are entitled only to the sum of $393.86, being the amount of the premiums paid under said policy, which amount had been tendered to plaintiffs and declined. The answer further alleges that on Septem-

ber 6, 1945, the War Department issued, pursuant to Section 5 of the Act of March 7, 1942 (Public Law 490, 77th Congress) as amended, a finding of death of a missing person, a copy of which is attached as an exhibit (R. 10) and which states in part:

> "The Chief, Casualty Branch, The Adjutant General's Office, finds First Lieutenant Richard E. Boye, 0392883, Air Corps, to be dead. He was officially reported as missing in action as of the 25th day of August, 1944. • • • "
>
> • • • • •
>
> "Lieutenant Boye was performing his regularly scheduled duties of pilot of a B-17 (Flying Fortress) bomber which participated in a bombardment mission over Germany on 25 August 1944. He was in a full flying status at the time of his death."

The answer further alleges that on February 27, 1947, the War Department issued a supplemental finding of death of a missing person, a copy of which is attached as an exhibit (R. 11), and which states in part:

> "Lieutenant Boye was a crew member of a plane which departed from England on 25 August 1944 on a bombing mission to Peenemunde, Germany. The last known whereabouts of the plane was at the coordinates 54° 10′ N.—13° 50′ E. at approximately 1.22 P.M. on the day in question. It is believed to have been lost as a result of enemy antiaircraft fire. No information is available as to the circumstances surrounding its disappearance."
>
> "The coordinates named above locate a point in the vicinity of the target, on the southeast coast of Germany."
>
> "Of two planes that failed to return from the mission, one was seen going down on fire, out of control. It was not established that this was Lieutenant Boye's plane."
>
> "A search of captured German records fails to reveal any data pertaining to the downing of subject plane or its crew members."

On this record, defendant moved for summary judgment (R. 12) and plaintiffs shortly thereafter likewise moved for summary judgment (R. 13).

The motions were argued before Justice Proctor and taken under advisement. Thereafter, Justice Proctor entered his Memorandum Opinion (R. 14) granting the motion of defendant. Judgment was thereupon entered on July 21, 1947, for the plaintiffs for the sum of $393.86 (the amount due in any event, being the amount of premiums paid on the said policy), and for defendant in all other respects (R. 16). An appeal was seasonably noted by the plaintiffs from this judgment.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals for the District of Columbia in holding that the missing pilot of a Flying Fortress, engaged on a bombing mission over the sea to a target on the southeast coast of Germany in time of war, did not come to his unfortunate death by reason of operating or engaging in aviation is not only contrary to reason, but directly contrary to a specific holding of the United States Circuit Court of Appeals for the Third Circuit, the case of Barringer v. Prudential Life Insurance Company of America, 153 F. (2) 224.

2. There is grave diversity between three United States Circuit Courts of Appeals, the District of Columbia holding that the loss of the pilot under the circumstances described did not come within the aviation exclusion clause; the Third Circuit in the Barringer case holding that the insured occupying a military plane flying from Puerto Rico to Trinidad and failing to reach his designation properly was presumed to have lost his life within the terms of the aviation exclusion clause; and the Fifth Circuit holding, under circumstances identical to those of the Barringer case, in effect that the beneficiary must await the operation of a 7-year absence presumption of death. This latter case is not yet

reported in the advance sheets of the Federal Reporter, but appears in the advance sheets of the Commerce Clearing House service under the citation of Smith v. Massachusetts Mutual Life Insurance Company, 13 Life Cases, 179.

3. The diversity of holdings between the Third and Fifth Circuits as between the Barringer and the Smith case is all the more unique when it is considered that the officer lost in each case was lost in the same plane on the same flight.

4. The question involved is one of gravity and importance to the insurance industry as a whole in that inevitably there are bound to be many claims for losses arising out of the disappearance of missing planes, and the chaos that prevails in the intermediate courts of appeals requires prompt review and settlement by this Honorable Court.

5. District of Columbia Court of Appeals appears peremptorily to have concluded that the insured came to his death as a result of gunshot wounds (R. 19). In so doing the Court usurped the fact finding prerogative of the trial court which had held (R. 15, R. 19) that, "The known circumstances point strongly to death by enemy gunfire, or by flames from a burning plane, or by the plane crashing upon the land or falling into the sea."

6. The Circuit Court of Appeals erred in rejecting, if not ignoring entirely, the applicable language of Title 28 USCA 661, as amended June 19, 1934:

> *"Books or records or other documents in any of the executive departments * * * * * shall be admissible as evidence of any act, transaction, occurrence, or event as a memorandum of which such books, records, or minutes were kept or made."*

Prayer for Writ.

WHEREFORE, your petitioner prays for writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the District of

Columbia commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant cause so that this cause may be reviewed and determined by this Court, and so that the judgment of the United States Circuit Court of Appeals for the District of Columbia may be reversed, and that the petitioner may be granted such other and further relief as may seem proper.

NEIL BURKINSHAW,
930 Shoreham Building,
Washington 5, D. C.
Counsel for Petitioner.

IN THE

Supreme Court of the United States

No.

UNITED SERVICES LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

v.

RICHARD H. BOYE AND LUCY BAUTZ BOYE, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Summary of Argument.

1. Diversity between Circuit Courts of Appeals requires review by this Honorable Court in the interest of orderly administration of justice.

2. Authenticated copies of records of the office of the Adjutant General of the War Department provide adequate proof that the death of the insured came within the terms of an aviation exclusion clause contained in the policy of life insurance.

3. There is no conflict between a freedom from restrictions clause as to military service on one hand and an aviation exclusion clause on the other.

4. That there is no ambiguity between the freedom from restrictions clause and the aviation exclusion clause is il-

lustrated by the application of the insured during his lifetime to have the aviation exclusion clause removed from the policy.

Argument.

I.

The paramount reason adduced by petitioner for issuance of the writ of certiorari is the chaos that prevails in the circuit courts with respect to the question at bar. This question is recurring frequently and is bound to come up many times in the future.

Examination of the opinions in this case, as well as the *Barringer* case in the Third Circuit, as well as the *Smith* case in the Fifth, reveals these Courts in postures that are not conducive to the orderly administration of justice. The question requires settlement by this Court.

II.

The only issued raised under the pleadings is whether an aviation exclusion clause in an insurance policy precludes recovery of the face amount of such policy when the proof of death is restricted to the fact that the insured was a pilot of a Flying Fortress that took part in a wartime bombing raid over Germany and failed thereafter to return to England. The answer of the insurance company averred that under the War Department's finding of death issued on September 6, 1945 (R. 10 and 11) and February 27, 1947 (R. 11 and 12) the insured on August 25, 1944 (the date of death as specified in the complaint) was performing his regularly scheduled duties of pilot of a Flying Fortress on a bombardment mission over Germany and was in full flying status at the time of his death; that the last known whereabout of the plane was in the vicinity of the target, Peenemunde, on the coast of Germany; that it was believed he was lost as a result of enemy antiaircraft fire; that no

information was available as to the circumstances surrounding his disappearance; that of two planes that failed to return from the mission, one was seen going down in flames, out of control, but it was not established that this was the plane of which the insured was pilot; and that a search of captured German records failed to reveal any data pertaining to the destruction of this plane or the loss of its crew members.

The position of the petitioner is that under applicable statutes of the United States and pertinent case law the facts as set forth in the authenticated records of the Adjutant General of the United States Army are adequate to establish that the insured met his death under circumstances that made operative the aviation exclusion clause.

First, counsel for the petitioner desire to direct the attention of the Court to certain statutes of the United States which it is urged provide for the use in evidence of authenticated copies of executive department records. Title 28, Section 661, derived from the act of September 15, 1789 (Chapter 14, paragraph 5, 1 Stat. 69), has been in familiar use for many years. Amended in 1934, it provides that copies, such as those from the Adjutant General's office, as utilized in this case, "*shall be admissible as evidence of any act, transaction, occurrence, or event,* as a memorandum of which such books, records, or minutes, were kept or made." (Emphasis supplied). The full text of the statute as amended is set forth on page 20. It would follow that the records of the Adjutant General as hereinbefore described would be entirely adequate to prove death under circumstances making the aviation exclusion clause applicable.

Next, there is the wartime statute enacted in 1942, Title 50, 1001, et seq., which provides under 1005 that when a person has been missing in action and no official report of death or of being a prisoner has been received, the department concerned shall cause a full review of the case to be made. Following such review, the statute states the depart-

ment then is authorized to make a finding of death. Paragraph 1009 of the same section provides that such a determination shall be conclusive as to death. The pertinent text of the statute is set forth on pages 21 and 22.

Next, counsel for the petitioner knows of no impediment whatever to the application of the Federal Shopbook Rule, Title 28, Section 695. While it is true that this rule pretty largely was designed to deal with entries in books of business houses, there is no reason why its purposes should not encompass entries made in government records. For instance in *Ulm* v. *Moore-McCormick Lines, Inc.*, 117 Fed. (2) 222, the statute was utilized to show entries in hospital records of the United States Public Health Service.

Giving full weight to the presumption that the War Department did make every diligent effort, both during the war and thereafter, to ascertain all possible information with respect to the circumstances surrounding the tragic death of a pilot, such as Captain Boye, it is only fair, in consonance with the statute, to accept fully the records of the War Department, particularly when it is to be observed that that department went so far as to search captured German records in quest of information (R. 12).

An authority precisely in point in that records of the Adjutant General of the United States were used to establish the fact of death is *In Re Straulina's Estate*, 134 A. 88, decided by the Orphans' Court of New Jersey in 1926:

> "First, as to the proof of his death, there was offered in evidence a copy of the records of the United States War Department, in which it is recited that decedent, during the war, while serving as a corporal received a severe gunshot wound on one side, in action, on October 9, 1918, and was left on the field as the company advanced, which certificate further identifies his grave, and is under the hand of John W. Weeks, Secretary of War, and the seal of the War Department is affixed thereto. This is plenary proof of his death."

III.

An exhaustive review of all war-time aviation exclusion cases discloses that the authority closest in point is that of *Helen M. Barringer, Appellant,* v. *Prudential Insurance Company of America,* 153 F. 2d 224. In that case the Third Circuit wrote no opinion, but adopted as its own that of Judge Kirkpatrick, the District Judge. That case, reported in 62 F. Supp. 286, presented the proposition of applicability of the aviation exclusion clause with respect to a military officer lost in a military plane while flying over open water.

The facts surrounding the death of the insured, as well as the reasoning of the Court, in concluding that death came within the compass of the aviation exclusion clause, are set forth here in detail:

> "At 12:30 p.m. on January 24, 1943, the insured, who was a major in the United States Army and a glider expert, boarded an Army C-47 airplane (a land plane) at Borinquen Field, Puerto Rico. The plane was piloted by an Army Lieutenant with a copilot and was under orders to fly direct to an airfield on the northeastern tip of Trinidad. A direct flight from Borinquen Field to Trinidad would be entirely over open sea with possibly one or two very small islands near the route. The plane left the field, and neither it nor any of its occupants have ever been seen or heard of since. I think this evidence is sufficient to support a finding that the insured's death resulted from riding in an airplane, and so I find.
>
> "No decisions directly in point were cited, nor can I find any, but the situation is analogous to one in which a plaintiff seeks to recover accident benefits upon evidence that the insured has disappeared. The defendant has the burden of proof here just as the plaintiff has in the disappearance cases. In both cases the burden is to prove not only the fact, but also, within certain limits, the manner of death, and I do not see why the same rules should not apply to both.
>
> "In Continental Life Insurance Co. v. Searing, 3 Cir., 240 F. 653, 657, the plaintiff contended that the insured had died accidentally by drowning, although

there were no witnesses and his body was not found. The Court said: 'This presumption of life can be met and overcome by proof of circumstances of specific peril to which the person disappearing was subjected, and we think there was evidence in this case which, if believed, tended to show such peril.' In Occidental Life Ins. Co. v. Thomas, 9 Cir., 107 F. 2d 876, 879, the Court said: 'It is not necessary that the proof go so far as to preclude all possible inferences except that of accidental drowning. * * * Thomas may be still alive, or if dead, it may be that he died from other than accidental causes; but the facts essential to a recovery need not be established to a moral certainty or beyond a reasonable doubt.'

"If the present policy had been an accident policy and the issue accidental death, it could hardly be doubted that, under the rules stated, the evidence if offered by the plaintiff would be deemed sufficient to support a verdict. True, the plaintiff in the present case did not have to prove accident but needed only to prove death and consequently did not offer the evidence of peril, but the inferences which the evidence will support are the same whether offered by the plaintiff or by the defendant.

"Now, I do not suggest that riding in an airplane always places a passenger in circumstances 'of specific peril' in the popular understanding of those words, but certainly it is as perilous as bathing in the ocean on a cool evening (as in the Searing case, there being no evidence in that case that the surf was high or the sea rough) or going fishing on a lake in the late afternoon as in the Thomas case.

"If the evidence would support the finding that the insured's death was accidental, I think there is no doubt that under the rule laid down by the decisions referred to it would, then it must also support the finding that the accident consisted in the plane's falling into the ocean. *That, it seems to me is not only a reasonable inference, but the only reasonable one.* As the Court said in the Thomas case, supra: 'This is a situation where * * * the same evidence not only supports the inference of death, but also points to the cause of it. *Various more or less fantastic explanations of disappearance of plane and passengers might*

be suggested but, with practically no land on the direct route to Trinidad, I do not see how there could be much doubt in the minds of any reasonable person that it came down in the sea. At any rate it is not necessary to preclude all other possibilities. "If the plane fell into the sea then, again, the reasonable, probable, and almost necessary conclusion, from the nature of the accident, is that the insured's death resulted from riding in an airplane. Again, there are possible theories which might account for his death otherwise as, for example, gunfire from a German submarine, but they are remote. Certainly, if it be taken as established that, having been riding in an airplane which fell into the sea and was lost with all on board, the insured is dead, it seems to me that it is not only permissible but reasonable and logical to conclude that he met his death as a result of riding in the airplane.

"I conclude as a matter of law that the plaintiff is not entitled to receive the face value of the policy but that she is entitled to recover the amount of the net reserve with interest." (Emphasis supplied)

Considering the facts in the instant case, it readily is to be seen that the insured in this case was in far greater peril. He was over enemy territory subject to antiaircraft fire, and the fact is established by records of the War Department that two planes failed to return from that flight and one was seen going down in flames. Hence, it is fair to assume that if the reasoning of Judge Kirkpatrick is good in the Barringer case, then there exists even greater reason in the present case for adhering to the doctrine enunciated by him.

Petitioner declines to accept the reasoning of the Circuit Court that death from a gunshot wound would not bring the case within the compass of the aviation exclusion clause. To petitioner, it seems that piloting a military plane in time of war over enemy territory is definitely an aviation hazard not covered by the policy. And, if death results from a gunshot wound while in such position of peril, it would seem that engaging in aviation was the proximate cause of death.

In the case of *Wagner* v. *The Supreme Industrial Life Insurance Company,* 17 S. (2d) 756, the Court of Appeals of Louisiana, 1944, held with respect to the disappearance of a seaman, after the vessel of which he was a member, was torpedoed, that his death might be proved by circumstantial evidence. It went on to state that all missing seamen presumably were dead. The sole information consisted first of a telegram from the Commandant of the United States Coast Guard stating that the insured was missing; second, a further letter from the Coast Guard reporting that there were 58 survivors from the vessel, and the others were presumed lost.

The respondents in this case in effect ask this Court to indulge in the speculation that even though the insured was in the position of extreme peril over enemy territory, he might have landed safely and thereafter succumbed either to gunfire on land or to death in a prison camp. That, the courts are not required to do.

IV.

It is quite true that this policy contained no general war exclusion clause. In view of the fact that the company wrote insurance on the lives only of commissioned personnel in the Army, Navy, Marine Corps, and Coast Guard, it hardly would have been feasible to exclude war risks. Anyway, it has been the practice of the insurance industry for many years, except in times of war or of impending war, to refrain from excluding hazards incident to war. It is urged, however, that the presence of an aviation exclusion clause and the absence of a general war exclusion clause are entirely compatible. There is no ambiguity, and there is no chance that the insured was misled in any way. On the contrary, there is to be noted the correspondence between the insured and the company (R. 13) which indicated that on March 19, 1943, the insured, upon being ordered to aviation duty, wrote the insurance company stating his understanding of the aviation exclusion clause and asking

for a form of application that would enable him to bring about its removal. This request was denied by the company on the ground that no such waiver was being accorded while the war was in progress. This correspondence is important as it eliminates any suggestion of ambiguity in the contract or misunderstanding on the part of the insured as to the extent of his coverage. It is familiar doctrine that when considering any possibility of ambiguity the understanding of the insured as to the meaning of the policy is to be accorded great weight.

Another factor in considering whether there was any conflict between the so-called freedom from restrictions clause on one hand and the aviation exclusion on the other is the concluding language in the aviation exclusion clause (R. 7) that "any provision in this policy to the contrary notwithstanding."

As to any alleged ambiguity, it is not the function of the courts—nor even their privilege—to rewrite contracts of insurance. The general rule of law (American Jurisprudence—Insurance, Section 160) is as follows:

> "In determining the intentions of the parties to an insurance policy, the policy should be considered and construed as a whole and if it can reasonably be done, that construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions. Seeming contradictions should be harmonized if reasonably possible. A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent."

The recent case of *Knouse* v. *Equitable Life Insurance Company of Iowa*, 181 P. (2) 310, was decided by the Kansas Supreme Court in June, 1947. The insured was killed while engaged in piloting a military plane. As in this case the beneficiary sought to obviate the effect of the aviation exclusion clause on the ground of ambiguity since

the policy did not contain a war exclusion clause. The Court said:

> "Did the fact the company did not attach a war clause make the aviation provision ambiguous? We think not. As has been noted in some of the cases reviewed above, it is fallacious reasoning to say that because a policy to exclude war risks, the scope of the contract which clearly excluded certain deaths in aerial flights, is, because of such failure, to be construed to cover all war risks and so to cover deaths in aerial flights of the excluded kind. The language in the aviation provision stating that death as a result of flight 'in any species of aircraft' except as a passenger under stated circumstances 'is a risk not assumed,' is clear and is not ambiguous because there was no war risk clause attached to the policy.
>
> "Neither may it be said that the clause refers only to civilian flights and not to military flights. Its language refers to flight 'in any species of aircraft,' about as all-inclusive language as could be used. We are not warranted in reading into this plain language, any words that would modify that language and make it say something other than was said. As was said at an earlier part of this opinion, where a contract is not ambiguous this court may not make another contract for the parties; our function is to enforce the contract as made."

Of interest in connection with the present case is *Green* v. *Mutual Benefit Life Insurance Company*, 144 F. 2d 55. The First Circuit in an opinion by Chief Judge Magruder said:

> "The natural and obvious meaning of the aviation clause in the case at bar is that the insurer declines to assume those extra risks of death ordinarily associated with aerial flight. Where death admittedly results from the operation of one of those familiar and popularly understood risks there cannot be any issue of proximate causation for a jury to determine. Drowning after a forced landing in icy waters during a 'very heavy driving snowstorm' with ceilings and visibility zero is indisputably a familiar risk ordinarily asso-

ciated with aerial flight. Appellant argues that a jury would have been warranted in finding that 'the insured at least temporarily reached a potential place of safety uninjured and his death thereafter occurred by reason of other fortuitous circumstances.' But such a finding would be utterly at variance with the stipulated facts."

Incidently, the First Circuit in the same opinion had occasion to review the case of *Bull* v. *Sun Life Assurance Company*, 141 F. 2d 456, on which the respondents in this case relied heavily. In that case the insured while on flying patrol had his plane disabled by anti-aircraft fire and was forced down on the water. While standing on the pontoon of his plane, he was killed by machine gun fire from a strafing Japanese plane. The First Circuit in considering the Bull case said:

"We are not inclined to disagree with this case. It may reasonably be said that death by the deliberate act of a third person is not one of the risks ordinarily associated with aerial flight. Travel in a plane brought the insured to the place where he met his death by enemy action, but he might just as well have been brought to that place by a boat or otherwise. Surely, if the plane had made a safe landing on the island, and the insured had been killed by a Japanese sniper upon alighting from the plane, 'a common-sense appraisement of every day forms of speech and modes of thought' would not lead us to say that death resulted from the aerial flight within the fair meaning of the aviation clause. The situation presented in the Bull case was no different in principle."

Conclusion.

On the basis of the foregoing it is respectfully submitted that the writ of certiorari should issue.

NEIL BURKINSHAW,
930 Shoreham Building, N.W.,
Washington 5, D. C.
Attorney for Petitioner.

SUPPLEMENT.

Title 50, U. S. C. A., 661, as amended June 19, 1934:

§ 661. *Copies of department or corporation records and papers; admissibility; seal*

(a) Copies on any books, records, or other documents in any of the executive departments, or of any corporation all of the stock of which is beneficially owned by the United States, either directly or indirectly, shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department or corporation, respectively.

(b) Books or records of account in whatever form, and minutes (or portions thereof) of proceedings, of any such executive department or corporation, or copies of such books, records, or minutes authenticated under the seal of such department or corporation, shall be admissible as evidence of any act, transaction, occurrence, or event as a memorandum of which such books, records, or minutes were kept or made.

(c) The seal of any such executive department or corporation shall be judicially noticed.

Title 28, USCA 695:

§ 695. *Admissibility*

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business" shall include business, profession, occupation, and calling of every kind.

Title 50, Sections 1005-1009:

§ 1005. *Same; department review; continuance of missing status or finding of death after year's absence; date or termination of pay and allowances*

When the twelve months' period from date of commencement of absence is about to expire in any case of a person missing or missing in action and no official report of death or of being a prisoner or of being interned has been received, the head of the department concerned shall cause a full review of the case to be made. Following such review and when the twelve months' absence shall have expired, or following any subsequent review of the case which shall be made whenever warranted by information received or other circumstances, the head of the department concerned is authorized to direct the continuance of the person's missing status, if the person may reasonably be presumed to be living, or is authorized to make a finding of death. When a finding of death is made it shall include the date upon which death shall be presumed to have occurred for the purposes of termination of crediting pay and allowances, settlements of accounts, and payments of death gratuities and such date shall be the day following the day of expiration of an absence of twelve months, or in cases in which the missing status shall have been continued as hereinbefore authorized, a day to be determined by the head of the department.

§ 1009. *Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death*

The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act, and for the purposes of this Act determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. The determination of the head of the department concerned, or of such subordinate as he may designate, shall be conclusive as to whether information received concerning any person is to be construed and acted upon as

an official report of death. When any information deemed to establish conclusively the death of any person is received in the department concerned, action shall be taken thereon as an official report of death, notwithstanding any prior action relating to death or other status of such person. If the twelve months' absence prescribed in section 5 of this Act has expired, a finding of death shall be made whenever information received, or a lapse of time without information, shall be deemed to establish a reasonable presumption that any person in a missing or other status is no longer alive. Payment or settlement of an account made pursuant to a report, determination, or finding of death shall not be recovered or reopened by reason of a subsequent report or determination which fixes a date of death except that an account shall be reopened and settled upon the basis of any date of death so fixed which is later than that used as a basis for prior settlement. Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act, to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: *Provided*, That no such account shall be charged or debited with any amount that any person in the lands of any enemy may receive or be entitled to receive from, or have placed to his credit by, such enemy as pay, wages, allowances, or other compensation: *Provided further*, That where the account of any person has been charged or debited with allotments paid pursuant to this Act any amount so charged or debited shall be recredited to such person's account in any case in which it is determined by the head of the department concerned, or such subordinate as he may designate, that payment of such amount was induced by fraud or misrepresentation to which such person was not a party. When circumstances warrant reconsideration of any determination authorized to be made by this Act the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. Excepting allotments for unearned insurance premiums, any allotments paid from pay and allowances of any person for the period of the person's entitlement under the provisions of section 2 of this Act to receive or have credited such pay and allowances shall not be subject to collection from the

allottee as overpayments when payment thereof has been occasioned by delay in receipt of evidence of death, and any allotment payments for periods subsequent to the termination, under this Act or otherwise, of entitlement to pay and allowances, the payment of which has been occasioned by delay in receipt of evidence of death, shall not be subject to collection from the allottee or charged against the pay of the deceased person. The head of the department concerned, or such subordinate as he may designate, may waive the recovery of erroneous payments or overpayments of allotments to dependents when recovery is deemed to be against equity and good conscience. In the settlement of the accounts of any disbursing officer credit shall be allowed for any erroneous payment or overpayment made by him in carrying out the provisions of this Act, except sections 13, 16, 17, and 18 in the absence of fraud or criminality on the part of the disbursing officer involved, and no recovery shall be made from any officer or employee authorizing any payment under such provisions in the absence of fraud or criminality on his part.

INDEX.

Subject Matter.

TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 215.

UNITED SERVICES LIFE INSURANCE COMPANY, a Corporation, *Petitioner,*

v.

EDWARD H. BOYE AND LUCY BAUTZ BOYE, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Statement of the Case.

The Statement of Facts contained in the Petition is deemed by Respondents to be an accurate summary of the pleadings and record, which admittedly contain all of the known facts, and no counter statement is considered necessary.

Summary of the Agreement.

1. No conflict exists between the decision of the United States Court of Appeals for the District of Columbia in this case, and the decisions of the United States Courts of Appeals for the Third and Fifth Circuits as asserted by Petitioner.

2. This case was correctly decided and involves only a determination by the United States Court of Appeals for the District of Columbia of a question of local law, and does not present any federal question of substance or any question of general importance.

Argument.

1. No conflict exists between the decision of the United States Court of Appeals for the District of Columbia in this case, and the decisions of the United States Courts of Appeals for the Third and Fifth Circuits as asserted by Petitioner.

Petitioner asserts and emphasizes as a reason for the granting of the Writ of Certiorari that there is a grave diversity between the decision of the Court below in this case, the decision of the United States Court of Appeals for the Third Circuit in *Barringer* v. *Prudential Insurance Company of America*, 153 F. 2d 224, and that of the Fifth Circuit in *Smith* v. *Massachusetts Mutual Life Insurance Company*, 167 F. 2d 990.

The three decisions are not in conflict and do not involve the same subject matter.

In this case the policy in question did not exclude war risks but did contain an aviation exclusion clause. As the insured met his death as a result of a combat mission the Court below correctly decided that all of the known circumstances pointed to death as a result of enemy action, the accepted risk, rather than to "riding or operating any kind of aircraft", the excluded risk.

No such considerations were involved or before the Third Circuit in the *Barringer* case. In that case no military or war clause appeared in the policy, and the only question was whether the known circumstances of the insured's disappearance and probable death brought the cause of death within the aviation exclusion clause. No enemy action or participation in combat was involved although the opinion

of Judge Kirkpatrick in the District Court (62 F. Supp. 286, 288), which was adopted in its entirety by the *per curiam* ruling on appeal, infers that a different result might have obtained if the death of the insured had resulted from "gunfire of a German submarine".

The situation before the Fifth Circuit in the *Smith* case was entirely different from the other two cases. The action was brought by the insurer seeking a declaratory judgment that its policies had matured by reason of the disappearance of the insured under circumstances which may have brought the cause of death within the aviation clause, and the insurer prevailed in the District Court. The Fifth Circuit reversed upon the theory that the action was premature in that the beneficiary had the right, if she so elected, to await further developments such as the possibility of reappearance of the insured, or further evidence as to the manner of his death. This result obviously has no bearing on either the *Barringer* case or the instant case.

In the light of even this brief analysis of the three decisions, the assertion that a conflict exists which should be resolved by this Court disappears. The cases do not involve the same subject matter, the questions presented to each Court are different, and the decisions do not conflict.

2. This case was correctly decided and involves only a determination by the United States Court of Appeals for the District of Columbia of a question of local law, and does not present any federal question of substance or any question of general importance.

There is no question of general importance involved in the decision in this case. No new rule of law is announced which, in the public interest, should be re-examined by this Court. The decision in this case turned entirely upon the proper construction of this particular policy in the light of the known facts and circumstances, or, more accurately stated, in the absence of proof as to the exact cause of death of the insured.

Only a brief comment is necessary in order to demonstrate that the case has been correctly decided. The complaint alleged the fact of death and claimed the face value of the policy. The answer admitted the fact of death, but as an affirmative defense further alleged that the cause of death, as shown by the two War Department Certificates attached as exhibits to the answer, was an excluded cause within the "Aviation Exclusion" of the policy. All of the known facts and circumstances surrounding the disappearance of the insured are contained in the War Department Certificates. They show no cause of death. The only facts they contain are negative. All they show is that the insured's plane failed to return from its mission, but its disappearance, and the disappearance of its crew, are not accounted for in any way. The Court of Appeals correctly held that the Petitioner had failed to establish the affirmative defense on which it relied, and which it had the burden of establishing. The Court further correctly held that the more probable cause of death was from enemy action as a direct result of participation in combat, a risk which the company accepted under its policy, and was not a result of riding or operating an aircraft within the aviation exclusion.

This case is one of first impression in the District of Columbia. The Court of Appeals was called upon to determine what the local law should be in this situation. It had to choose between the conflicting legal contentions of the parties, and reach a solution under the common law of the District. No federal statute or federal question of substance was involved in this determination.

This Court has frequently recognized that sound judicial policy and administration requires that the determination of local law in the District of Columbia be left to the United States Court of Appeals for the District of Columbia. As illustrative of this policy, in *Fisher* v. *United States,* 328 U. S. 463, 476, this Court (Mr. Justice Reed) said:

> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5."

And in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 284, the following appears:

> "We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited, or which declare the common law of the District."

The United States Court of Appeals for the District of Columbia has made a correct determination of the local law in this case. It is respectfully submitted that this Court should not interfere with that determination.

Conclusion.

By reason of all of the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JUSTIN L. EDGERTON,
THOMAS M. RAYSOR,
1366 National Press Building,
Washington 4, D. C.,
Counsel for Respondents.

Of Counsel:

FRANK S. ANDERSON,
Erie County Savings Bank Building,
Buffalo 2, New York.